

69347-6

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NO. 69347-6-1

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

JACOB A. WARNER,

Appellant.

2013 AUG 14 PM 1:30  
COURT OF APPEALS  
STATE OF WASHINGTON  
*[Handwritten signature]*

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BRIEF OF RESPONDENT

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## **I. ISSUES**

(1) The trial court imposed conditions precluding the defendant from possessing alcohol or frequenting establishments where alcohol is the chief commodity for sale. Although the defendant has suffered from alcohol addiction in the past, the record does not indicate that the crime was alcohol related. Do these conditions exceed the court's sentencing authority?

(2) Is the term "drug paraphernalia" unconstitutionally vague?

## **II. STATEMENT OF THE CASE**

The defendant (appellant), Jacob Warner, pleaded guilty to first degree assault and first degree robbery. CP 29-44. He agreed that the facts set out in the Affidavit of Probable Cause could be considered for imposing sentence. CP 37. According to that affidavit, on the late evening of April 11, 2011, the defendant and his mother, Debra Glenn, entered the home of the defendant's stepfather, Royce Glenn. Mr. Glenn had recently filed for divorce from Ms. Glenn. As part of the divorce proceedings, he had obtained an order restraining her from being at the residence. CP 48.

The defendant and Ms. Glenn went into Mr. Glenn's bedroom. There, the defendant restrained Mr. Glenn while Ms. Glenn hit him with a baseball bat. Mr. Glenn broke free, went into the bathroom, and locked the door. The defendant and Ms. Glenn broke in. The defendant then started hitting Mr. Glenn with some implement other than the bat. CP 48.

Mr. Glenn again broke free. He fled the house and called police. The defendant and Ms. Glenn fled as well. They took with them Mr. Glenn's wallet, which held some of his credit cards. When police searched the house, they found a bat and a torque wrench, both of which had blood on them. CP 48-49.

After the defendant pleaded guilty, the court ordered a pre-sentence report. The defendant told the interviewer that he was under the influence of methamphetamine at the time of the assault. The defendant believed that if it were not for his intoxication he would not have committed the crimes. CP 6. The defendant also reported a history of alcohol addiction. The defendant claimed, however, that he had not used alcohol in the past three years. CP 12.

The standard sentence range totaled 111-147 months. The court sentenced the defendant to the top end of this range. The

court also imposed 36 months of community custody. CP 18-20.

The conditions of community custody included the following:

4. Do not possess or consume alcohol and do not frequent establishments where alcohol is the chief commodity for sale.

...

7. Do not possess drug paraphernalia.

CP 25. No objection was raised to either of these conditions. Sent

RP 8-9, 13-14.

### **III. ARGUMENT**

#### **A. THE STATE CONCEDES THAT THE PROHIBITIONS AGAINST POSSESSING ALCOHOL AND FREQUENTING ALCOHOL ESTABLISHMENTS EXCEEDED THE TRIAL COURT'S AUTHORITY.**

The defendant raises two challenges to his community custody conditions. Both are asserted for the first time on appeal.

First, the defendant challenges the portions of condition no. 4 that deal with possession of alcohol and frequenting establishments where alcohol is sold. The defendant claims that these conditions exceeded the court's authority. Such a claim can be raised for the first time on appeal. State v. Jones, 118 Wn. App. 199, 204, 76 P.3d 258 (2003).

RCW 9.94A.703 sets out conditions of community custody that can be authorized by the court. Subsection (3) sets out conditions that are within the court's discretion:

As part of any term of community custody, the court may order an offender to:

- (a) Remain within, or outside of, a specified geographical boundary;
- (b) Refrain from direct or indirect contact with the victim or the crime of a specified calls or individuals;
- (c) Participate in crime-related treatment or counseling conditions;
- (d) Participate in rehabilitative programs or otherwise perform affirmative conduct reasonable related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community;
- (e) Refrain from consuming alcohol; or
- (f) Comply with any crime-related prohibitions.

As the defendant acknowledges, subdivision (3)(e) authorizes a court to prohibit an offender from *consuming* alcohol, regardless of the circumstances of the crime. In contrast, other alcohol-related prohibitions are authorized by subdivision (3)(f) only if they constitute "crime-related prohibitions."

A "crime-related prohibition" is "an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted." RCW

9.94A.030(10). Although the prohibition must be directly related to the crime, it need not be causally related. State v. Letourneau, 100 Wn. App. 424, 432, 997 P.2d 436 (2000). Here, the record shows that the defendant has in the past suffered from alcohol addiction. CP 12. Nevertheless, the record does not demonstrate any connection between alcohol use and the defendant's crimes. Consequently, the State agrees that the conditions relating to alcohol use and frequenting alcohol-related establishments have not been shown to be crime-related. Condition 4 should be modified to delete these conditions.

**B. THE TERM 'DRUG PARAPHERNALIA' CAN BE UNDERSTOOD BY PERSONS OF ORDINARY INTELLIGENCE.**

The defendant also challenges condition no. 7, relating to possession of drug paraphernalia. He claims that this condition is unconstitutionally vague. Again, this issue can be raised for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744 ¶ 5, 193 P.3d 678 (2008).

The test for vagueness is the same for statutes and community custody conditions. Id. at 754 ¶ 27. A statute is unconstitutionally vague if it fails to either (1) define the offense with sufficient definiteness that ordinary people can understand what

conduct is proscribed or (2) provide ascertainable standards of guilty to protect against arbitrary enforcement.” Id. at 753 ¶ 23. “If persons of ordinary intelligence can understand what the law proscribes, notwithstanding some possible areas of disagreement, the law is sufficiently definite.” Id. at 754 ¶ 26. Unless a law implicates constitutional rights, “a facial vagueness challenge can succeed only if the statute is impermissibly vague in all of its applications.” Id. at 745 n. 2.

The term “drug paraphernalia” is defined by statute:

“[D]rug paraphernalia” means all equipment, products, and materials of any kind which are used, intended for use, or designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance

RCW 69.50.4121(1). The statute goes on to set out a lengthy list of items that constitute “drug paraphernalia.” The United States Supreme Court has upheld similar statutory language against a vagueness challenge. Posters ‘N’ Things, Ltd. v. United States, 511 U.S. 513, 525-26, 114 S. Ct. 1747, 128 L. Ed. 2d 539 (1994). When a term is defined by statute, a court should not be required to

reproduce the same definition in a judgment and sentence. Doing so simply invites error and confusion.

In any event, the statutory definition of “drug paraphernalia” coincides with the ordinary understanding of that term. For example, ask.com defines “drug paraphernalia” as “any kind of equipment, product or materials that are used in making, using or concealing any kind of illegal drugs.” [http://answers.ask.com/Health/Addictions/what\\_is\\_drug\\_paraphernalia](http://answers.ask.com/Health/Addictions/what_is_drug_paraphernalia) (visited 8/12/13). Wikipedia gives an almost identical definition: “any equipment, product, or material that is modified for making, using, or concealing drugs.” [http://en.wikipedia.org/wiki/Drug\\_paraphernalia](http://en.wikipedia.org/wiki/Drug_paraphernalia) (visited 8/12/13). Since the term “drug paraphernalia” has a clear and commonly-understood meaning, it is not unconstitutionally vague.

The defendant claims that this case is governed by State v. Valencia, 169 Wn.2d 782, 239 P.2d 1059 (2012). There, the court invalidated a prohibition against possessing “any paraphernalia that can be used for the ingestion or processing of controlled substances or that can be used to facilitate the sale or transfer of controlled substances.” As the court pointed out, this prohibited the defendant from possessing “paraphernalia,” *not* “drug

paraphernalia.” *Id.* at 794 ¶ 18. Virtually any commonplace item, such as sandwich bags or paper, could be used as drug paraphernalia. *Id.* at 794-95 ¶19. Consequently, the condition in that case was unconstitutionally vague.

The prohibition in this case is significantly different. It does not prohibit than the defendant from possessing anything that *can* be used ingest or process drugs. Rather, it only prohibits items that are actually used for that purpose, or that are intended or designed for such use. Such a prohibition is constitutionally valid.

#### **IV. CONCLUSION**

Condition no. 4 should be modified to remove the prohibition against possessing alcohol and frequenting establishments where alcohol is the chief commodity for sale. In all other respects, the sentence should be affirmed. The defendant has not challenged his convictions for first degree assault and first degree robbery or his sentence totaling 147 months’ confinement. Those portions of the

judgment and sentence should therefore be affirmed in any event.

Respectfully submitted on August 13, 2013.

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